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17 UNITED STATES DISTRICT COURT
18
19 NORTHERN DISTRICT OF CALIFORNIA
20
21 SAN FRANCISCO DIVISION

22 UNITED STATES OF AMERICA,
23
24 Plaintiff,
25
26 v.
27
28 JOHN J. COTA and
FLEET MANAGEMENT LIMITED,
Defendants.

Case No. CR 08-00160 SI

**DEFENDANT JOHN J. COTA'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO CHANGE VENUE OR,
ALTERNATIVELY, FOR SPECIAL
JURY SELECTION PROCEDURES**

Date: September 22, 2008
Time: 11:00 am
Judge: Honorable Susan Illston

Speedy Trial Act; Excludable Time Through
Disposition, 18 U.S.C. § 3161(h)(1)(F)

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1 **I. INTRODUCTION.**

2 By this Motion, Captain John J. Cota (“Captain Cota”) requests that the Court transfer
 3 this case to the Eastern District of California in Fresno in order to protect Captain Cota’s
 4 constitutional right to trial before a fair and impartial jury. In the eight months since the
 5 container vessel M/V COSCO BUSAN (“COSCO BUSAN”) accident, the San Francisco Bay
 6 Area has been subject to massive, continuous media coverage of this event in a manner that other
 7 communities simply have not, notwithstanding national coverage of the incident. There have
 8 been more than 800 articles about the spill and Captain Cota’s connection to it between the date
 9 of the spill and July 2 – even before the government filed its second Superseding indictment on
 10 July 22. In the *San Francisco Chronicle* alone, which no doubt is seen and read by virtually
 11 every potential juror, there were more than 200 articles. These articles were not buried on the
 12 back page. In a sampling of just 63 *Chronicle* articles, there were 38 page-one articles with 39
 13 negative references to Captain Cota in the first four weeks after the spill. One could hardly
 14 walk by a newspaper machine without seeing one. The passage of time has not ended this
 15 relentless onslaught. Beginning in the fifth week after the spill and continuing through July of
 16 this year, the *Chronicle* ran 25 more page-one articles that had 265 negative references to
 17 Captain Cota.

18 The media blitz that has buried Captain Cota includes far more than the 200+ articles in
 19 the *Chronicle*. Almost 600 additional articles appeared in other papers read by the potential
 20 jurors including the *San Francisco Examiner*, the *San Francisco Business Times*, the *San Jose*
 21 *Mercury News*, the *San Mateo County Times*, the *Oakland Tribune*, Associated Press (Regional
 22 and Local) and *Contra Costa Times*. Nearly all of these articles directly reference Captain Cota
 23 by name, and the majority of them can fairly be described, even by the most casual layperson, as
 24 prejudicial to him. What’s worse, most contained inaccurate, incorrect and misleading
 25 information. This print media blitz is only the tip of the iceberg. The television, radio and
 26 internet coverage is immeasurable.

1 The overwhelming quantity of media covering the spill and Captain Cota is only a part of
2 the story. The substance of those articles convicted Captain Cota in any reader's mind. Articles
3 have called him "the spill captain," the "bay spill pilot," and the "pilot who ran the ship into the
4 bridge" causing the "worst spill in 20 years." Dozens of articles accused him incorrectly of
5 misusing medications based on the apparent publication of information apparently leaked by
6 government officials that is supposed to be protected from disclosure under federal law, being in
7 up to a dozen other incidents as a pilot (also untrue), possibly being impaired due to alcohol use
8 (untrue). Barely a mention was made that he passed all drug and alcohol tests, that he had a 26
9 year career that was essentially error free, and that he safely piloted thousands of ships before
10 this incident.

11 In many instances the flames of prejudice against Captain Cota that were reported in the
12 media were given the aura of accuracy and authority based on media reports that claimed to be
13 characterizing statements by government officials and agencies, or quoting from official
14 transcripts. Articles quoted officials as saying the accident was 'a direct result of Captain Cota's
15 piloting.' Moreover, much of the prejudicial content is incorrect, misleading and may not even
16 be admissible in trial.

17 This media blitz actually increased against Captain Cota. With the one year anniversary
18 of the spill just ten days before trial, it has and will continue, as the media repeats its tradition of
19 celebrating the one year anniversary of newsworthy events. This prejudicial pretrial publicity is
20 virtually unavoidable within this community and thus necessitates a change of venue.

21 While the massive prejudicial pretrial publicity that has convicted Captain Cota in the
22 press is clear from even a casual review of the 800 articles attached to this Motion, a more
23 methodical and scientific analysis of these materials by an expert confirms this. Dr. Craig New,
24 an expert in evaluating the impact of media on parties to litigation, particularly in criminal cases,
25 conducted a methodical analysis of these reports, based on a sampling of just one paper – the *San*
26 *Francisco Chronicle*. He has concluded that this medium has saturated the community and
27 rendered it reasonably likely that Captain Cota cannot get a fair trial.

We are mindful that such motions are not often granted, but submit that the extraordinary nature of the pervasive media coverage directed against Captain Cota has been so prejudicial that no amount of *voir dire* will ensure an unbiased, fair and impartial jury.

II. PROCEDURAL HISTORY.

On the morning of November 7, 2007, the COSCO BUSAN scraped the San Francisco Bay Bridge fendering system, damaging the ship's hull and bunker fuel tank, thereby resulting in the fuel tank in the vessel to spill oil into the San Francisco Bay. During the incident, Captain John Cota was onboard the COSCO BUSAN as an advisory pilot. On March 17, 2008, the United States Attorney's office formally charged Captain Cota with one count of negligence under the Clean Water Act ("CWA") and one count of violating the Migratory Bird Treaty Act ("MBTA"). On April 22, 2008, the Grand Jury returned a Superseding Indictment realleging the two misdemeanor counts and adding two felony counts for making false statements. On July 21, 2008, this Court severed the misdemeanor and felony counts, based on the fact that the matters relating to the false statement charges had nothing to do with the CWA or MBTA. On July 22, 2008, the United States Attorney obtained a Second Superseding indictment, this time realleging all the charges previously filed against Captain Cota, and charging Fleet Management Limited which managed and operated the COSCO BUSAN, with one count of negligence under the CWA, one count of violating the MBTA, three counts of false statements under 18 U.S.C. § 1001, and three counts of obstruction of justice under 18 U.S.C. § 1519.

III. ARGUMENT.

A. Transfer is Necessary Where Prejudice is Presumed from the Fact that the Community Where the Trial is to be Held is Saturated with Prejudicial and Inflammatory Media Publicity.

The Sixth Amendment of the U.S. Constitution "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). It is fundamental to our system of law "that the conclusion to be reached in a case will be induced only by the evidence and argument in open court, and not by any outside influence,

1 whether of private talk or public print.” *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

2 Accordingly, Rule 21(a) of the Fed. R. Crim. P. provides that “[u]pon the defendant’s motion,
3 the court must transfer the proceeding against that defendant to another district if the court is
4 satisfied that so great a prejudice against the defendant exists in the transferring district that the
5 defendant cannot obtain a fair and impartial trial there.”

6 In the Ninth Circuit, change of venue is proper where there exists either actual or
7 presumed prejudice. *Daniels v. Woodford*, 428 F.3d 1181 (9th Cir. 2005). Actual prejudice
8 exists where “the jurors demonstrated actual partiality or hostility that could not be laid aside.”
9 *Id.* at 1211. Presumed prejudice exists when “the community where the trial was held was
10 saturated with prejudicial and inflammatory media publicity about the crime.” *Id.* Factors to be
11 considered in determining presumed prejudice include: “(1) whether there was a ‘barrage of
12 inflammatory publicity immediately prior to trial, amounting to a huge...wave of public
13 passion;’ (2) whether the news accounts were primarily factual because such accounts tend to be
14 less inflammatory than editorials or cartoons; and (3) whether the media accounts contained
15 inflammatory or prejudicial material not admissible at trial.” *Id.*

16 In *Daniels*, the Ninth Circuit Court of Appeals reversed defendant’s conviction for first-
17 degree murder of two police officers, finding presumed prejudice among the jurors. Applying
18 the factors described above, the court noted that the killings generated extensive media coverage
19 immediately after the shootings and again before trial, including press accounts that identified
20 defendant as the killer. *Id.* at 1211. Local newspapers printed letters calling for defendant’s
21 execution. Some news articles also reflected the prosecution’s theory of the case (i.e.
22 defendant’s motive to escape justice for a prior crime). The court found media “saturation”
23 based on the fact that eighty-seven percent of the jury pool recognized the case from the media
24 coverage, and two-thirds of those empaneled recalled some aspect of the case from the press it
25 received. *Id.* at 1211-12. In reaching its decision, the Court explained that “[t]he nature and
26 extent of the pretrial publicity, paired with the fact that the majority of actual and potential jurors
27 remembered the pretrial publicity warranted a change of venue.” *Id.* at 1212.

1 The U.S. Supreme Court has also required transfer of criminal cases due to prejudicial
2 publicity. In *Sheppard v. Maxwell*, 384 U.S. 333 (1966), for example, a defendant charged with
3 murdering his wife was the subject of extensive newspaper, radio and television publicity,
4 including matters which were unfavorable to defendant but not presented during the trial, which
5 was held in a suburb of Cleveland, Ohio. *Id.* at 338-42. The trial judge denied various requests
6 by the defense for both a change of venue and specific interrogation of the jurors regarding their
7 exposure to the publicity. After defendant's conviction, the Supreme Court reversed and ordered
8 a new trial. *Id.* at 357, 363.

9 The Court found that defendant did not receive a fair trial consistent with the due process
10 clause of the Fourteenth Amendment. *Id.* at 335. The Court explained that "due process requires
11 that the accused receive a trial by an impartial jury free from outside influences" and that "courts
12 must take such steps by a regulation that will protect their processes from prejudicial outside
13 interferences." Specifically, "where there is a reasonable likelihood that prejudicial news prior
14 to trial will prevent a fair trial, the judge should continue the case until the threat abates, or
15 transfer it to another county not so permeated with publicity." *Id.* at 362-63 (emphasis added).
16 Finding that the trial court failed to protect defendant from the "inherently prejudicial publicity
17 which saturated the community," the Court reversed defendant's conviction. *Id.* at 363.

18 *Marshall v. United States*, 360 U.S. 310 (1959), is also instructive. In *Marshall*, the
19 Supreme Court reversed defendant's conviction for illegally selling prescription drugs based on
20 the fact that some jurors were exposed during the trial to *two* newspaper articles which stated that
21 defendant had prior felony convictions – evidence the Court had previously ruled was
22 inadmissible. After the trial judge questioned each juror individually in chambers and was
23 assured by each that he/she would not be influenced by the articles, the judge allowed the case to
24 proceed. In reversing defendant's conviction, the Supreme Court explained that "prejudice to the
25 defendant is almost certain to be as great when...evidence reaches the jury through news
26 accounts as when it is part of the prosecution's evidence" and "may indeed be greater for it is
27 then not tempered by protective procedures." *Id.* at 312-13.

Finally, it is important to note that while in many cases the change in venue is made either after voir dire or during/after trial, Rule 21 transfers are not “solely curative” and are, in fact, most valuably used pretrial. *United States v. Marcello*, 280 F. Supp. 510, 514 (U.S. Dist. Ct. E.D. La.) (stating that “the rule evokes foresight, always a more precious gift than hindsight” and that “it is the well-grounded fear that the defendant will not receive a fair and impartial trial which warrants the application of the rule”). In *Marcello*, the defendant had been subject to scant prejudicial publicity with respect to the indictment at issue, but substantial bad press previously as the alleged leader of a mafia crime ring. In affirming a venue transfer, the court explained that “when the pretrial publicity is great, the court may disregard prospective jurors’ assurances of impartiality.” *Id.* at 514, citing *Irvin v. Dowd*, 366 U.S. 717, 727-28 (1961). The court found that “[i]t is therefore quite proper, if not indeed required in some instances, to make the determination [to transfer], as we have done, solely on the basis of the pretrial publicity which has undoubtedly, as here, created a dominant sentiment of prejudice in the community.” *Id.* at 515.

B. Captain Cota Cannot Receive a Fair and Impartial Trial in the San Francisco Bay Area Due to Extensive Prejudicial and Inflammatory Media Coverage.

Applying these cases here, it is apparent that there is far more than merely a “reasonable likelihood” that prejudicial pretrial publicity will prevent Captain Cota from receiving a fair trial in this district. The San Francisco community where this trial is scheduled to be held has been saturated with prejudicial and inflammatory media publicity about the crime. This has continued through this summer and will continue as the one-year anniversary of the spill occurs just days before trial. This prejudice is demonstrated by the expert analysis of articles appearing in the *Chronicle*, and is further confirmed by even the most cursory review of many other media outlets servicing this community.

1
2 **1. Expert Analysis Demonstrates that the Extensive Inflammatory Local**
3 **Media Coverage of the COSCO BUSAN Incident and Captain Cota**
4 **by the *San Francisco Chronicle* is Preemptively Prejudicial to Captain**
5 **Cota.**

6 Dr. Craig New, who is a qualified expert and has extensively analyzed, researched, and
7 written on the impact of pretrial publicity on criminal defendants, has examined publicity in this
8 case.¹ As set forth in his declaration, the pretrial publicity surrounding this case has been both
9 pervasive and extremely prejudicial to Captain Cota. *Id.* at ¶ 13. As is discussed further below,
10 the spill generated between 207 and 228² articles in only eight months in the *San Francisco*
11 *Chronicle* alone. *Id.* These articles described the spill as the “biggest oil spill there in over 20
12 years and depicted Captain Cota as, among other things, the “spill pilot.” *Id.* The spill and the
13 resulting damage have been described in the *Chronicle* in extensive and emotional detail. *Id.* at ¶
14 14. The result of this level and type of negative publicity is highly likely to create a strong
15 community desire to hold someone accountable for the damage. *Id.* Moreover, the appearance
16 and concentration of prejudicial material with respect to Captain Cota has increased since the
17 spill, particularly since March 2008, and has painted a picture of him as being responsible for the
18 spill, as having a drinking problem and abusing medications, and having a history of poor
19 performance as a pilot. *Id.* at ¶ 15. This information will only serve to reinvigorate the
20 community desire for accountability and focus it on Captain Cota. In the opinion of Dr. New,
21 this has created a climate of prejudice within the venue in which it will be exceedingly difficult

22
23 ¹ Dr. New is well qualified to apply content analysis in the context of a change of venue motion.
24 His academic training is in the application of social psychological principles to legal issues. *Id.* at
25 ¶ 2. It included formal training in content analysis. Declaration of Dr. Craig New, at ¶ 4
26 (hereafter “New Decl.”). He has previously been involved in 31 cases relating to change of
27 venue in a variety of states and has been retained as the primary venue expert in 19 cases. *Id.* at ¶
28 7. He has been qualified in a number of courts as an expert in pretrial publicity and its effect on
juror bias and juror judgment. *Id.* at ¶ 8

² As explained in his declaration, Dr. New examined the articles in the *Chronicle* using an on-
line search methodology. The *San Francisco Chronicle* is published in print and on-line
versions. Of the 228 on-line articles found, 207 were designated as having appeared in the print
edition. It is possible that designation was omitted from the remainder.

1 to seat fair and impartial jurors or enter the trial with the presumption of innocence intact.³ *Id.* at
2 ¶¶ 15, 59-61.

3 In reaching his opinion, Dr. New analyzed the effect of the *Chronicle*'s pervasive and
4 prejudicial pretrial publicity on Captain Cota's ability to seat fair and impartial jurors using the
5 well-accepted content analysis methodology. Content analysis is a systematic procedure for
6 summarizing the content of pictorial or verbal material. *Id.* at ¶ 16. It is one of the most
7 effective and commonly used tools for analyzing the content of pretrial publicity as it relates to
8 venue issues. *Id.* Trial courts have long accepted it for this purpose. *Id.*

9 When using content analysis, a researcher first develops a set of themes to be coded and
10 then examines items, for example, newspaper articles, to determine which of the themes are
11 present. *Id.* at ¶ 17. In this case, Dr. New performed a content analysis of a representative
12 sample of 63 of the 228 articles that appeared in the *Chronicle* from November 8, 2007 to July 2,
13 2008.⁴ The selected sample consisted of each case-relevant news article appearing on page 1 of
14 any section of the *Chronicle*. *Id.* at ¶ 23. Dr. New selected page-one articles because they are
15 the most prominently placed and most likely to be read and reflect the editor's assessment of
16 public interest. *Id.* This coded sample included only news articles and did not include letters to
17 the editor, columns or similar articles even though they are highly indicative of community
18 views, but did not appear on page one. *Id.* The selected articles were then evaluated for the
19 extent of coverage (i.e., a quantitative analysis) and the nature of that coverage (i.e., a qualitative
20 analysis).

21 The results of the sample demonstrate that the volume of media articles prejudicial to
22 Captain Cota is significant and pervasive. They further indicate that the pretrial publicity
23 regarding the spill and, in particular, Captain Cota, can be viewed as coming in two phases.
24

25 ³ Extensive research confirms that exposure to negative pretrial publicity is associated with juror
26 bias in a criminal case. New Decl. ¶ 9.

27 ⁴ The *Chronicle* was selected as the appropriate media outlet for the content analysis based on
28 the breadth of its circulation along with the likely residence of the jury pool. *Id.* at ¶ 18, fn. 2.
In addition, the media coverage of this incident was so pervasive that there was insufficient time
to cover all media sources. *Id.*

Articles in the first phase, which includes weeks 1-4 after the spill (November 8 to December 7, 2007), discuss the spill itself, Captain Cota, the cleanup and community reaction, among other topics. During this phase, in 38 page-one articles, there were 39 instances of prejudicial content relating to Captain Cota. For example, Dr. New noted that one page-one article in the *Chronicle* on November 7, 2007, says

Capt. John Cota, who was in charge of navigating the COSCO BUSAN when it hit the bridge, has been involved in a number of ship-handling incidents and was reprimanded last year for errors in judgment when he ran a ship aground near Antioch.

See New Decl. ¶ 26 and Attachment B. # 5.

In Phase 2, covering the period from mid-December 2007 through July 2, 2008, there was a remarkable increase in the focus on Captain Cota. During this phase, in just 25 page-one articles, there were **at least** 265 instances of prejudicial content relating to him.⁵

Again, Dr. New noted the following examples. In an article dated January 19, 2008, the *Chronicle* reported:

Federal authorities are investigating reports that Capt. John Cota, pilot of the container ship Cosco Busan, was suffering from a sleep disorder and was taking medication that may have affected his judgment.

New Decl. ¶ 26, and Attachment B. # 191. In an article dated April 9, 2008:

Immediately after he guided the container ship Cosco Busan into one of the support towers of the bay bridge, Capt. John Cota, the ship's pilot, apologized to the skipper of the big ship. 'Sorry, Captain,' Cota is quoted in the transcript of the doomed voyage last fall... 'I misunderstood the chart. I thought that was the center.

Id. Attachment B. # 217.

⁵ Content related to the spill and subsequent litigation has been a consistent presence in the *Chronicle* since November of 2007. There were 71 media articles in the first week alone and an average of 40 media articles per week during the initial phase of publicity. Clearly, even the most casual newspaper reader would have been exposed to multiple instances of prejudicial content during this time frame. Although the volume of articles decreased after mid-December, to 2.3 articles per week, the spill's effects and developments associated with Captain Cota continued to generate press. *Id.* at ¶ 28 and Figure 3.

Thus, while the initial burst of publicity was substantial and prejudicial in several ways, the articles most prejudicial to Captain Cota have occurred since March 2008 and are likely to continue as trial approaches.⁶ *Id.* at ¶ 31.

The location of an article in the newspaper is another important aspect of the quantitative analysis aspect of content analysis. Location is an important structural feature because it relates to the impact the article will have on readers and to the editor's judgment of the level of public interest. *Id.* at ¶ 32. Most of the coverage in this case has been prominently placed. In the 228 *Chronicle* articles that discuss the spill there were 39 articles that appeared on page A1 and 34 that appeared on the page B1. In all, 36% of the 228 articles appeared on page one of one of the newspaper sections. *Id.*

2. The Substance of the Massive Coverage Was Almost Uniformly Prejudicial to Captain Cota.

Not only is the volume of pervasive and prejudicial articles relating to Captain Cota significant, the nature of that coverage has convicted Captain Cota, regardless of the facts. In the 63 article sample the allusion itself was described or referenced in some way 133 times, using language such as "crashing," "smashing," "slamming," or "ramming" into the bridge or the bridge tower. *Id.* at ¶ 34 and Attachment B. Captain Cota was said to have "hit the bridge," "run into the bridge," "scraped the bridge," "sideswiped the bridge," or "clipped the bridge." *Id.*

The resulting spill was also frequently mentioned - 220 instances - and was described as a "major oil spill," and the "worst oil spill...since 1996." *Id.*, Attachment B, # 4, 5. The oil itself was depicted as foul and dangerous, for example: "deadly black goo," "tarry, gooey black mess," or "toxic bunker fuel oil." *Id.* Attachment B. # 73, 5. Such prominent, frequent, and dramatic depictions of the accident and the spill along with the firsthand observations of many area citizens have saturated the venue, making it highly probable that potential jurors were exposed to prejudicial information about this case. *Id.* at ¶ 36.

⁶ Moreover, as is discussed below, most of the recent articles have been filled with details concerning Captain Cota's actions, his alleged responsibility for the accident and spill and the legal claims filed against him. *Id.* at ¶ 31.

1 Following the initial coverage that depicted the scope and nature of the spill, the
2 subsequent articles have focused more on the cause of the spill and who was or should be
3 responsible for it. *Id.* at ¶ 37. Captain Cota has been the unrelenting focus of these reports. He is
4 mentioned by name in connection with the spill 227 times and 131 of these mentions have
5 occurred since March 18. No other single individual was mentioned so prominently and
6 repeatedly. This consistent and repeated association is prejudicial because it blames him for the
7 accident by using words that imply responsibility such as “bay spill pilot,” “oil spill pilot,” or the
8 “pilot who ran into the bridge.” *Id.* at ¶ 38. In the 63 articles examined for the content analysis
9 there were 97 instances in which responsibility for the accident and the spill was specifically
10 placed on Captain Cota. *Id.* at ¶ 39. The first attribution of blame occurred on December 7,
11 2007 in page A1, and was filled with prejudicial material. *Id.* at ¶ 39. It reported that a
12 “thorough investigation” by the state Board of Pilot Commissions had “minced no words” and
13 said that the “accident was ‘a direct result of Captain’s Cota’s piloting.’” *Id.*, Attachment C, #
14 159. The article goes on to discuss the charges against Captain Cota and to detail his alleged
15 mistakes that led to the accident.

16 The focus on Captain Cota intensified beginning on March 18, 2008, *id.* at ¶ 41, with an
17 article that describes him as the pilot who was navigating the ship when it “crashed into the Bay
18 Bridge in November, spilling more than 50,000 gallons of fuel into the bay and killing thousands
19 of birds...” *Id.* The articles continues with a description of the federal charges brought against
20 Captain Cota and a list of a series of actions that allegedly indicate his negligence, for example,
21 sailing in the fog, failing to proceed at a safe speed and not reviewing the proposed course with
22 the ship’s Captain and officers. *Id.*

23 In fact, the March 18 article was the first of 19 articles related to the accident from that
24 point to July 2. Ten of these articles dealt squarely with the issue of Captain Cota’s
25 responsibility for the accident, his history of ship handling incidents, and/or the litigation against
26 him. *Id.* at ¶ 42. These ten articles were prominently placed with four running on page A1 and
27 five on page B1. The content of these articles was shockingly inflammatory. In one (Attachment
28

1 B to the New Decl., #210, the headline is, “**Cosco Busan Pilot Charged with Pair of Crimes.**”

2 In that article it says,

3 The state pilot commission investigation last year concluded Cota made a number
4 of errors and that ‘pilot error was the cause of the crash.’

5 In another the headline reads, “**Cosco Busan Pilot Convicted of DUI in 1999.**” In that article it
6 says,

7 The pilot of the container ship that sideswiped the Bay Bridge and spilled 53,000
8 gallons of fuel oil into the bay, was convicted of drunken driving in 1999 and was
9 taking medications for depression, anxiety, and sleep apnea, that could have
impaired his ability to steer the ship federal officials said Wednesday.

10 New Decl, Attachment B, Article # 218.

11 Dr. New observed that one of the most prejudicial articles appeared on April 12, 2008. It
12 reported on the voice recording device on the ship which the article claimed proved several of
13 the charges against Captain Cota. It also incorrectly cast doubt on Captain Cota’s contention that
14 the crew’s English language skills were insufficient. Finally, it misleadingly attributed certain
15 statements to Captain Cota which were tantamount to reporting a confession in the press⁷ and
16 would make it “exceedingly difficult for a juror with this information to begin the trial free from
17 bias or without preformed opinions.” *Id.*

18 The articles included in Dr. New’s analysis included other types of prejudicial content in
19 addition to that attributing responsibility to Captain Cota. Twenty-six instances in six articles
20 discussed Captain Cota’s alleged piloting problems in the past. *Id.* at ¶ 45. Massive and
21 unfounded speculation regarding the role of drug and/or alcohol use by Captain Cota appeared
22 almost immediately after the incident. *Id.* at ¶ 46. While there were a handful of reports
23 acknowledging that Captain Cota had tested negative for drugs and alcohol, the vast majority
24 still focused on alleged prescription medications and how they might affect his ability to pilot a
25 ship. *Id.* at ¶ 47. They incorrectly reported medications and medical conditions, and were in part

26 _____
27 ⁷ The quoted statements were allegedly said by Captain Cota just after contacting the Bridge
28 tower and include the statement: “Yeah, that’s the bridge pier (expletive). I thought it was the
center. Oh (expletive.)” *Id.* at ¶ 43

1 based on information that, if accurate is supposed to be protected by federal law, but was
2 improperly leaked.

3 Finally, there has been a parade of articles regarding the legal actions against and
4 possible consequence for Captain Cota. *Id.* at ¶¶ 48-49. Mentions of legal actions, potential or
5 actual, occurred at least 84 times in 20.6% of the coded articles. Consequences faced by him
6 appeared 29 times in 14.3 % of the articles. In addition, Captain Cota's decisions to invoke his
7 Fifth Amendment rights and to refuse to testify before the Pilot's Commission have appeared
8 four times in three recent articles. *Id.* at ¶ 51. According to Dr. New, these factors are likely to
9 contribute to the development of a juror's belief that Captain Cota has done something wrong
10 and to reinforce a juror's opinion regarding Captain Cota's guilt. *Id.* at ¶¶ 50-52.

11 According to Dr. New three other areas of prejudicial content are likely to impact
12 significantly the attitudes of those in the likely jury pool when combined with the foregoing
13 prejudicial and negative reporting. First, the environmental impact of the spill, the cleanup
14 efforts and the future environmental damage have been significant themes in the media coverage,
15 appearing in 54 of the 63 articles in the sample (82.5%). *Id.* at ¶¶ 52-55. This extensive damage
16 from the spill and the various aspects of life affected by it creates a situation in which the jurors
17 will have a larger stake in the outcome of the trial because the event is seen as a crime against the
18 community.⁸ *Id.* at ¶ 56. They are likely to want to hold someone responsible. Second, the
19 press had reported extensively on the community volunteer response to the spill. Reports of this
20 appeared in 28.6 % of page-one articles. A negative attitude developed through personal
21 experience is, typically, stronger and more difficult to overcome. *Id.* at ¶ 57. Finally, the
22 governmental response to the spill, including the number of hearings and investigations held,
23 and the stated desire to place blame for the spill emphasize the importance of the issue to the
24 area and is likely to create a desire to hold Captain Cota responsible. *Id.* at ¶ 58. The imprimatur
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27 ⁸ Such a situation is therefore different from the typical criminal case which involves a crime
28 against a single victim and less personal juror identification. *Id.* at ¶ 56.

1 of government officials' comments regarding Captain Cota only serves to reinforce and
2 legitimize the media's negative portrayal of Captain Cota.

3 Dr. New's content analysis establishes that, in this venue, Captain Cota cannot receive
4 the "fair trial by a panel of impartial," "indifferent jurors" required by the Sixth Amendment.
5 *Irvin, supra* at 722. The results of the analysis compel the conclusion that prejudice from pretrial
6 publicity must be presumed. The evidence clearly demonstrates that the venue has been
7 saturated with news articles that are prejudicial and inflammatory regarding Captain's Cota's
8 responsibility for the accident. *Daniel, supra* at 1181.

9 Moreover, much of the prejudicial content is incorrect, misleading and may not even be
10 admissible in trial. There is no truth to the stories that Captain Cota was on the medications
11 reported. There is no truth to the stories that he was investigated 12 times. There is no truth to
12 the stories that he navigated the vessel through the Bay. He did not. He neither had the authority
13 nor the permission of the Master to do so. There is no truth that other vessels did not get
14 underway because of the weather conditions. The navigation information upon which the many
15 stories prejudicing Captain Cota are based is incorrect, faulty, and according to the government
16 was falsified by members of the crew. Dozens of passenger laden ferries operated at speeds far
17 faster than the COSCO BUSAN.

18 Based on the foregoing, there is a very reasonable likelihood that the prejudicial news
19 regarding Captain Cota which has appeared and will continue to appear will prevent a fair trial
20 and a change of venue is warranted. *Sheppard, supra* at 362-63. Otherwise Captain Cota will
21 not be guaranteed that the verdict in his case was induced only by the evidence in court and was
22 not the result of the outside influence of "public print." *Patterson, supra* at 462.

23 **3. Even a Casual Review of the Inflammatory and Prejudicial**
24 **Reporting of Captain Cota in Other Media Seen, Read and Heard in**
25 **This Community Easily Demonstrates Presumptive Prejudice**
Requiring a Change of Venue.

26 The scientific analysis of the *San Francisco Chronicle* demonstrates, standing alone, the
27 presumptive prejudice sufficient to compel changing venue. But even a cursory review of the
28

1 almost 600 other articles appearing in print media between November 7, 2007 to July 2, 2008
2 demonstrates substantial prejudice and negative reporting regarding Captain Cota. These articles
3 appeared in, among other outlets, the *San Francisco Examiner*, the *San Francisco Business*
4 *Times*, the *San Jose Mercury News*, the *San Mateo County Times*, the *Oakland Tribune*,
5 Associated Press (Regional and Local) and *Contra Costa Times*. See New Decl. and Appendix
6 D. And even this cursory review does not include television, radio and internet reports that have
7 saturated the community.

8 Nearly all of these articles directly reference Captain Cota by name, and the majority of
9 them can fairly be described, even by the most casual layperson, as negative. They suggest the
10 same negative themes that Dr. New identified on the dozens of page-one articles from the
11 *Chronicle*. Just like the *Chronicle*, the onslaught against Captain Cota started as soon as the
12 spill occurred, and became even more focused and pronounced beginning in late March and
13 continuing until July, when this canvassing of articles ended. The following is a brief
14 description of a small sampling of the articles:

15 (1) Articles focused on and contained massive and incorrect statements about Captain
16 Cota's use of medications, medical conditions, alleged alcoholism and repeatedly incorrectly
17 implicitly or explicitly connecting them to the cause of the spill while almost uniformly failing to
18 note the one uncontested fact that Captain Cota passed every drug and alcohol test he was given
19 including false, incorrect and misleading reports that in one sentence talked about the spill and in
20 the next said things like (i) Captain Cota "was taking a combination of medications that should
21 have barred him from having his license renewed," (ii) he was "treated for alcoholism and
22 depression in 1999 and had a DUI conviction," (iii) "Cota had a drunken driving conviction and
23 a history of alcohol abuse and took numerous prescription drugs that could have impaired his
24 judgment," (iv) "Cota suffers from sleep apnea, a breathing condition that can disrupt sleep all
25 night long and leave sufferers severely fatigued during the day" (v) Cota was taking Provigil "to
26 ward off drowsiness," (vi) investigators have been probing whether Cota's sleep disorder or
27 medication he took for it contributed to the accident (despite the fact that such connection is not
28

1 alleged in the indictment); and (vii) reports Cota was taking prescriptions for glaucoma.

2 Attachment D # 403, 701, 703, 704, 721, 722, 723, 725, 741, 768, 769, 772, 774, 775, 776, 777,
3 778, 780, 781, 782, 785, 788, 789, 790, 791, 792, 793, 794, 795, 797, 800, 801, 803, 804, 807,
4 808, 811, 816, 817, 818, 819, 820, 821, 824, 825, 828, 833, 849, 869, 870, 872.⁹

5 (2) Articles incorrectly saying that Captain Cota was responsible for steering the vessel
6 through the Bay, and was somehow exclusively responsible for the vessel's movements, which
7 he indisputably was not, and suggestions that he should be responsible because of how much he
8 earns. Examples include headlines and articles saying: (i) "With Ship Pilot's Clout, Pay Comes
9 Great Responsibility"; (ii) crews of large vessels depend on one person – Bar pilots; (iii) Bar
10 pilots take daily responsibility for huge cargoes costing billions of dollars; (iv) thousands of
11 passengers and the welfare of the people, structures and ecosystem along the way; (v) the that
12 average Bar Pilot's income was \$491,892; (vi) Cota stands to make a "substantial pension" upon
13 his retirement; (vii) "much of [investigators's] attention will undoubtedly be focused on [the]
14 pilot, 59-year-old John J. Cota of Petaluma"; and (viii) the NTSB's investigation is focusing on
15 "the *key role* of Cota" (emphasis added). Attachment D # 359, 575, 617, 618, 629, 633, 800,
16 803, 804, 844, 845.

17 (3) Incorrect and false reports that Captain Cota acknowledged that the spill was his
18 fault. ... "Cota apologized to the captain for misreading electronic instruments...underplayed
19 damage...a *distraught* harbor pilot told the captain 'Sorry, I misunderstood the chart. I thought
20 that was the center,' and at the same time faced 'felony counts for making false statements'."
21 Attachment D # 436, 475, 800, 803, 852.

22 (4) False, incorrect and misleading reports that Captain Cota had "struggled to navigate
23 the vessel," (he did not), "had a history of poor performance..."(he did not), "had been the
24 subject of 12 probes..." (he was not), "had reportable incidents on his record....", "had a pattern
25

26 ⁹ As the Status Report submitted on August 14, 2008, by Fleet Management, Ltd. indicates, there
27 will be an unrelenting effort by it to make this the center of its defense. If Captain Cota is
28 exposed to this, the need for a jury uninfected by these massive press reports is all the more
important.

1 of performance degradation” as a Bar pilot (he did not), was “enraged and irrational,” that
 2 Captain Cota was “struggling” (he was not) and later that “Cota and the Chinese captain
 3 squabbled” Attachment D # 303, 318, 554, 555, 561, 562, 774, 776, 780, 787, 790, 791, 792,
 4 793, 794, 795, 797, 803, 813, 814, 815, 816, 819, 828, 850. Not a single report mentioned his
 5 99.9% perfect record. In every case the aura of accuracy of these statements was enhanced
 6 because the reports tied these statements to those of officials.

7 In sum, there can be no doubt that the pretrial prejudicial publicity in this case constitutes
 8 presumptive prejudice against Captain Cota. Accordingly, Captain Cota’s trial should be
 9 transferred from this venue.

10 **C. Alternatively, the Court Should Take Specific Measures to Protect**
 11 **Captain Cota’s Right to a Fair and Impartial Jury Trial.**

12 We respectfully submit that no amount *voir dire* or other mitigation measures can
 13 assure Captain Cota of a fair trial due to the massive pretrial prejudicial publicity. Should the
 14 Court decline to transfer this case to a different venue, Captain Cota requests that the Court take
 15 specific measures in an effort to protect his right to a fair and impartial jury trial. As explained
 16 by the Ninth Circuit Court of Appeals, “when pretrial publicity is great, the trial judge must
 17 exercise correspondingly great care in all aspects of the case relating to publicity which might
 18 tend to defeat or impair the rights of an accused.” *Silverthorne v. United States*, 400 F.2d 627,
 19 637-38 (9th Cir. 1968).

20 As a threshold matter, this case should not be scheduled for trial just a week after
 21 the one-year anniversary of the COSCO BUSAN incident. It has become commonplace for the
 22 news media to “celebrate” high profile and negative incidents on the first anniversary of their
 23 occurrence. Hurricane Katrina spawned one-year retrospectives. *See, e.g.,* Editorial, *Katrina,*
 24 *One Year Later: There’s Still No Substitute for Competence*, Wash. Post., Tuesday, August 29,
 25 2006, at A14. Particularly where environmental damage occurs, attention is paid to whether the
 26 alleged damage has been cured and the victims of it made whole. *See, e.g.,* Ralph Blumenthal,
 27 *Many From Love Canal Remain Unsettled*, N.Y. Times, February 14, 1981, at B26 (chronicling
 28

difficulties facing victims of toxic waste site in upstate New York State). Captain Cota therefore requests that the trial date be continued for at least a month from its currently scheduled date of November 17, 2008.

In addition, the Court should implement jury selection procedures which address the extensive, prejudicial media coverage of this matter. It is critical in high-profile cases that “the judge must insure that the *voir dire* examination of the jurors affords a fair determination that no prejudice has been fostered” and determine whether “the nature and strength of the opinion formed [if any] are such as in law necessarily...raise the presumption of partiality.” *Silverthorne*, 400 F.2d at 638.

At a minimum, the *voir dire* process must be reasonably sufficient to test for bias or partiality. *United States v. Dischner*, 974 F.2d 1502, 1522 (9th Cir. 1992), overruled on other grounds in *United States v. Morales*, 108 F.3d 1031, 1035, fn. 1 (9th Cir. 1997). Indeed, *voir dire* “serves the dual purpose of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges” (which the Supreme Court has recognized as “one of the most important rights secured to the accused”). See *Mu’Min v. Virginia*, 500 U.S. 415, 431 (1991); *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965).

Furthermore, in cases, as here, involving the risk of prejudice from pretrial publicity, it is proper to conduct individualized *voir dire* of potential jurors outside the presence of other potential jurors. *Silverthorne v. United States*, 400 F.2d at 640; *United States v. Harris*, 542 F.2d 1283, 1295 (7th Cir. 1976). Also, in such cases, the *voir dire* must include inquiry into the specific information each juror had obtained relative to the case and their source of knowledge. *Silverthorne v. United States*, 400 F.2d at 640.

In accordance with these requirements, Captain Cota requests that the following jury selection procedures be followed in this case:

(1) Juror Questionnaire: A juror questionnaire will streamline the selection process and allow for jurors to candidly address the inquiries of the Court and counsel in advance of *voir dire*, without the risk of prejudicing the other venire members. While it is not a substitute

1 for *voir dire*, a juror questionnaire is an effective and efficient mechanism for preliminary
2 screening of jurors.

3 (2) Individualized, Sequestered *Voir Dire*: As set forth above, sequestered
4 *voir dire* of individual venire members is appropriate in this case. It will enable jurors to
5 privately discuss their exposure to prejudicial pretrial publicity without defeating the very
6 purpose of jury selection by infecting other potential jurors with prejudicial information to which
7 they have been exposed. In a case involving issues as volatile as those presented here,
8 sequestered *voir dire* must be utilized.

9 (3) Counsel *Voir Dire*: Due to the complexity of the issues in this case as
10 well as the massive amount of pretrial publicity, a reasonable period of counsel *voir dire* is
11 appropriate. Counsel *voir dire* will allow for exploration of subtle areas of bias which may be
12 rooted in factual intricacies or the individualized circumstances of the parties. Further, given the
13 importance of peremptory challenges in a case of this nature, the parties should be allowed to
14 inform the use of such challenges through counsel *voir dire*, in a manner specific to that party's
15 cause.

16 (4) Additional Peremptory Challenges: The Court has authority to provide
17 defendants with additional peremptory challenges. Fed. R. Crim. P. 24(b). The Court should do
18 so here given the overwhelming pretrial publicity in this case and the importance and difficulty
19 of ascertaining which jurors harbor prejudice as a result of such publicity.

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1 **IV. CONCLUSION.**

2 For the foregoing reasons, Captain Cota respectfully requests that this Court grant his
3 motion to transfer venue. Should this Court decline to do so, Captain Cota reserves the right to
4 seek a continuance and to seek additional jury selection procedures to give Captain Cota a
5 chance to receive a fair trial.

6
7 Respectfully submitted,

8
9
10 K&L GATES LLP

11 Dated: August 18, 2008

12 By: /s/ Jeffrey L. Bornstein

13 Jeffrey L. Bornstein, Esq.

14 Luke G. Anderson, Esq.

15 Barry M. Hartman, Esq., *Admitted Pro Hac Vice*

16 Christopher R. Tate, Esq., *Admitted Pro Hac Vice*

17 Attorneys for Defendant

18 JOHN J. COTA

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California by a member of the Bar of this Court, at whose direction this service was made. I am over the age of 18 and not a party to the within action. My business address is 55 Second Street, Suite 1700, San Francisco, CA 94105. On August 18, 2008, I served the document(s) described as:

Defendant John Cota's Memorandum of Points and Authorities in Support of Motion to Change Venue or, Alternatively, for Special Jury Selection Procedures

on the parties to this action named on the attached service list by the method described below.

(BY PERSONAL SERVICE) I caused a true and correct copy of said document(s) to be served by hand to the addressee(s) listed below, with the name and address of the person served shown on the envelope.

(BY OVERNIGHT DELIVERY) I enclosed a true and correct copy of said document(s) in an envelope/package provided by an overnight delivery carrier addressed to the addressee(s) listed below, sealed it, and placed it for collection and overnight delivery following the ordinary business practices of K&L Gates LLP. I am readily familiar with the firm's practice of collecting and processing correspondence for overnight delivery. On the same day that correspondence is placed for collection and overnight delivery, it is collected by an overnight delivery carrier. Delivery fees are pre-paid or provided for in accordance with the ordinary business practices of K&L Gates LLP.

X (BY ELECTRONIC TRANSMISSION) I transmitted a true and correct copy of said document(s) by electronic mail to the offices of the addressee(s). I did not receive, within a reasonable time after the transmission, any message or other indication that the transmission was unsuccessful.

(BY FACSIMILE) I transmitted a true and correct copy of said document(s) by facsimile to the offices of the addressee(s). Upon completion of the facsimile transmission, a transmission report was issued showing the transmission was complete and without error.

(BY U.S. MAIL) I enclosed a true and correct copy of said document(s) in an envelope addressed to the addressee(s) listed below and placed it for collection and mailing following the ordinary business practices of K&L Gates LLP. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service with postage fully prepaid at San Francisco, California.

Executed on August 18, 2008 at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Mae A. Chu
Mae A. Chu

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